Filed 1/25/10 P. v. Cunningham CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOHN CUNNINGHAM,** **Defendant and Appellant.**	**A123483** **(Contra Costa County Super. Ct. No. 010396-0)**

PROCEDURAL AND FACTUAL BACKGROUND[1]

The victim, referred to at trial and herein as John Doe (Doe), is the son of defendant John Cunningham (appellant). Doe, born in August 1989, testified that he lived with his mother, Wanda, for the first 10 years of his life. In December 1999, when Doe was 10 years old, he went to live with appellant. Doe testified that shortly after he moved in with appellant, appellant began forcibly sodomizing him and forcing him to orally copulate appellant. Sometimes while being sodomized by appellant, Doe screamed for help because it hurt "very bad" and appellant put his hand over Doe's mouth to stop Doe from screaming. Because appellant threatened to kill Doe if he told anyone about the abuse, Doe was fearful and did not tell anyone until December 2000. In January 2001, Doe was interviewed by San Pablo Police Officer Palmieri and told Palmieri that

[1] This background is largely derived from our opinion in *People v. Cunningham* (Dec. 14, 2007, A103501 [nonpub. opn.]) (*Cunningham II*).

appellant sexually abused him numerous times beginning shortly after he moved in with appellant.

In *People v. Cunningham* (Apr. 18, 2005, as mod. May 4, 2005, A103501 [nonpub. opn.]) (*Cunningham I*), we affirmed appellant's conviction by jury trial of continuous sexual abuse of a child under age 14 (Pen. Code, § 288.5), including the trial court's decision to impose the upper term of 16 years in reliance on certain aggravating factors not found by the jury or admitted by appellant. We rejected appellant's argument that his sentence violated his Sixth Amendment right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296. Following our decision, appellant's petition for review was denied by our Supreme Court (June 29, 2005, S133971), but the United States Supreme Court reversed our earlier ruling upholding imposition of the upper term and remanded the matter "for further proceedings not inconsistent with [its] opinion." (*Cunningham v. California* (2007) 549 U.S. 270, 294 (*Cunningham*).) In *Cunningham II*, we vacated the sentence imposed by the trial court and remanded for the trial court "to exercise ' "broad discretion" in selecting among the three terms specified by statute for the offense, subject to the requirements that the court consider the aggravating and mitigating circumstances as set out in statutes and rules and that reasons be stated for the choice of sentence.' " (Quoting *People v. Sandoval* (2007) 41 Cal.4th 825, 843 (*Sandoval*).) On November 6, 2008, the trial court again sentenced appellant to the upper term of 16 years.

THE TRIAL COURT'S SENTENCING DECISION

The trial court's statement of reasons for reimposing the upper term is the focus of appellant's current challenge. We set it out in full.

"I have reviewed the record in this case again, the probation officer's report, all of the letters submitted in support of [appellant] by his family and friends as well as their statements in court in his behalf. I have reviewed the reports of Drs. Kincaid and Lundeen, and the letters from [Doe] and his mother Wanda.

"This sentencing will now proceed under the new provisions of Penal Code section 1170[, subdivision] (b).

"I understand . . . that the defense contends that this statutory reformation amounts to an ex post facto violation of the [United States] Constitution, but as we know from . . . *Sandoval* . . . , the California Supreme Court has rejected this argument.

"Now, pursuant to the provisions of [Penal Code] section 1170[, subdivision] (b), the trial court has discretion to impose any of the three terms provided by statute. There is no longer a presumptive middle term. Here the statutory structure as we know is a low term of six years, a middle term of 12 years, and an upper term of 16 years.

"I also understand that pursuant to the *Sandoval* case my sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and the spirit of the law, and that is based upon an individualized consideration of the offense, the offender, and the public interest.

"As to the offense, based upon the testimony elicited in this courtroom from [appellant]'s 13-year-old son, the facts as they unfolded showed horrific circumstances which this child was forced to face time after time.

"As [Doe] testified, whenever his father would have an argument with his girlfriend or when he became agitated with [Doe], that is when [appellant] would force [Doe] to submit to acts of sodomy or oral copulation. These are acts that occurred not just once or twice but on many occasions, after which [appellant] would threaten his son with great bodily harm if he told anyone about them.

"I can recall that as [Doe] haltingly and with great reluctance testified to the many, many acts of sodomy and oral copulation over this year-long period when he lived exclusively with his father, his eyes filled with tears as did the eyes of several members of the jury.

"He talked about being in great pain during the acts of sodomy and about how his father would turn up the music in the house to drown out his cries. He talked about his father's threats to ['mess him up'] if he should tell anyone about these acts.

"As difficult as it was to hear [Doe] recount these horrible instances of sexual abuse, it was equally difficult to see that this child felt terrible that he had to testify against the father that he loved.

"During his testimony [Doe] repeatedly referred to his father as 'John' instead of 'Dad.' In his letter to the [c]ourt he did so again and said, ['] At night I have bad dreams about John attacking and following me. In one dream he came to my school and I ran and hid in the bathroom. But when I got there and locked the door, he was already there. He had a butcher knife and it was dripping with blood. And he said to me, "Come back home with me." All I could say is, "Why me? Why me?" '

"And that is the essential question in this case as to why [appellant] victimized this particular child. From all the evidence, he did so because this was the child who cried wolf one time too many. This is the child who came to live with [appellant] because he could not get along in his mother's home with his stepfather. This is the child whom no one would believe based upon other times when he had not told the truth. This is the child who could be abused in such a horrific manner because no one would ever take his word against the word of a respected peace officer.

"Well, the jury in this matter did take [Doe's] word, because after hearing days of testimony they returned a guilty verdict within the hour.

"As to consideration of the offender, I am taking into account [appellant]'s lack of prior record. One would expect a peace officer, however, to have no prior record, so this factor has limited significance to the [c]ourt. Also, the other factors that play in this matter so override this factor as to render it almost meaningless.

"As to consideration of the public interest, whether [appellant] was a peace officer or a minister or a good provider or a baseball coach or a football coach, the fact remains that he committed acts which were not just intrinsically heinous but which were committed in the most horrific way against his own [10]-year-old son.

"It is a crime which, as was stated at the last hearing, tears at the fabric of society in a way that other crimes do not. A child, particularly one's own child, relies upon the parent for love, trust, and protection. To violate this love and trust in so savage a way is a truly monstrous act. It is an act, which involved a high degree of cruelty and viciousness and threats of great bodily harm.

"Whether or not [appellant] is capable of committing such an offense again, society has as a primary interest [in] the protection of its children against such incomprehensible acts of great violence.

"To say that this case was both heartbreaking and horrible in nature is an understatement. The lasting effect of [appellant]'s sexual abuse of his [10]-year-old son is simply too terrible to contemplate for [Doe] and for society as a whole.

"This case is not deserving of the low term and it is not deserving of the middle term. For all of these reasons, I am imposing the upper term of 16 years in the [s]tate [p]rison for the felony violation of Penal Code section 288.5."

ANALYSIS

Appellant does not dispute that Penal Code section 1170, subdivision (b), as modified following the *Cunningham* decision, governs the court's sentencing discretion. That statute provides, in pertinent part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (§ 1170, subd. (b).) Instead, appellant argues the court abused its discretion by relying on improper aggravating factors and disregarding numerous mitigating factors. We disagree.

The trial court relied on several aggravating factors. It concluded that the crime "involved a high degree of cruelty and viciousness and threats of great bodily harm." Appellant concedes that the record reflects threats of great bodily harm, but argues that the record fails to support the court's reliance on a high degree of cruelty and viciousness. Appellant misconstrues the trial court's reasoning. Rule 4.421(a)(1) of the California Rules of Court (hereafter, rules), describes one justification for imposing an upper term: "The crime involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness." The challenged statement by the court simply acknowledges this rule, which is triggered by any one of the circumstances mentioned. The evidence of appellant's threats to Doe if he

disclosed the molestations justifies the court's decision to impose the upper term, even if no separate evidence of cruelty or viciousness is present.

The trial court also relied on the sheer number of sexual assaults committed by appellant on Doe. "These are acts that occurred not just once or twice but on many occasions . . . ." Citing *People v. Young* (1983) 146 Cal.App.3d 729, 734, appellant argues that "[s]ince Penal Code section 288.5 specifically requires that the abuse occur more than once or twice in order to support a conviction, this fact . . . violated the prohibition against aggravating a sentence because of facts inherent in the conviction." Again, we disagree. There is substantial evidence that appellant abused Doe many more times than section 288.5 requires. As noted in *Cunningham II*, the probation report estimated Doe was "brutally whipped and sodomized over 100 times in a one year period." Thus appellant's offense was "distinctively worse than it would ordinarily have been," justifying the prison term imposed. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682; see *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1776.)

The trial court also relied upon the fact that appellant was the father of the victim. Despite appellant's apparent argument to the contrary, a parental relationship is not inseparable from the crime itself, which simply requires that the perpetrator be someone who resides with the child or has recurring access. And the fact of parenthood increases the seriousness of the crime and may reasonably be taken into account in deciding which of the three statutory penalties to impose.

The trial court also relied on Doe's vulnerability. (Rule 4.421(a)(3).) As we understand its reasoning, the court believed that appellant took advantage of the circumstances that had led Doe to leave his mother's home, after living with her for his entire life, and move in with appellant. Specifically Doe had claimed he had suffered physical abuse and neglect from his mother and stepfather, accusations that had not been confirmed by the police, child protective services, or medical professionals. Appellant points to the absence of express testimony that appellant was motivated to abuse Doe because of these allegations. But it was reasonable for the trial court to believe that

Doe's prior allegations made him more vulnerable, because these allegations made it less likely he would be believed by the authorities if he lodged accusations against appellant.

We also reject appellant's claim that the court gave "inadequate or no weight to numerous mitigating factors." The trial court expressly stated it had considered "all of the letters submitted in support of [appellant] by his family and friends as well as their statements in his behalf . . . , [and] the reports of Drs. Kincaid and Lundeen." The court expressly mentioned some of the arguments raised by appellant's supporters in its sentencing statement, including appellant's lack of any prior criminal record, but found that all of these mitigating factors were far outweighed by the factors supporting the upper term. The sentencing statement reflects a careful and articulate weighing of the relevant factors, and each aggravating factor was supported in the record. There was no abuse of discretion in the court's decision to accord little if any weight to the mitigating circumstances in the factual context of this case. (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813; see *People v. Regulado* (1980) 108 Cal.App.3d 531, 538-539.)[2]

[2] Because of our resolution of this matter, we need not address respondent's contention that appellant forfeited the right to challenge the court's sentencing decision.

DISPOSITION

The judgment is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, P.

BRUINIERS, J.